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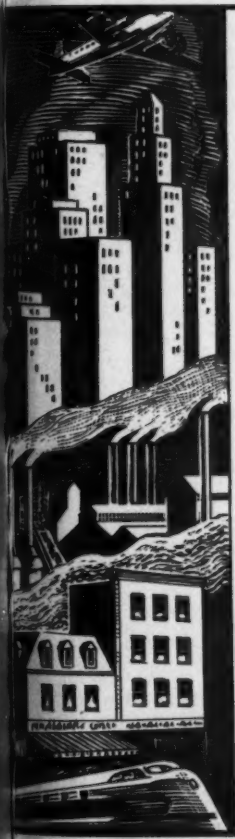

## *"Principal Place of Business" in Federal Diversity Cases*

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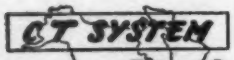


The Corporation Trust Company
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*The* CORPORATION JOURNAL

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APRIL—MAY 1961

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### *Recent Decisions*

# WHOSE HAND ON THE THROTTLE?

It *should* be a lawyer's—*your* hand for *your* clients.

Client protection is your responsibility. So why shouldn't it be you who selects the statutory agent or office to be designated for a client about to qualify in some state as a foreign corporation?

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# Federal Diversity Jurisdiction

## "Principal Place of Business"

SEVERAL important decisions have construed the recent amendment to the diversity of citizenship jurisdiction of the Federal district courts. The first case, *Scot Typewriter Co., Inc. v. Underwood Corp.*,[1] was considered in the October—November, 1959, issue of the Corporation Journal. Although the *Scot* case and those decided since reveal difficulties inherent in the language itself, they justify at least tentative conclusions as to the meaning of the phrase "principal place of business."

In 1958, Congress amended the diversity of citizenship jurisdiction of the district courts to provide that a corporation "shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."[2] Prior to the 1958 Amendment, corporations had been regarded by the courts, for the purpose of diversity jurisdiction, as citizens only of the state of incorporation. The maintenance by a corporation of its principal place of business in a state other than the state of incorporation did not constitute the corporation a citizen of the foreign state for the purpose of diversity jurisdiction.

The *Scot* case, decided by the United States District Court, S. D. New York, has become one of the two leading cases on the interpretation of "principal place of business." That action was commenced in the Supreme Court of New York and removed to the United States District Court for the Southern District of New York on defendant's petition alleging diversity of citizenship. Plaintiff, a New York corporation, moved to remand to the state court, claiming that there was no diversity of citizenship. The plaintiff alleged that, although defendant was a Delaware corporation, it was also a citizen of New York because it maintained its principal place of business in that state.

Defendant's executive offices were located in New York City. Its President, Chairman of the Board, three of its five Vice Presidents, the Treasurer, Assistant Treasurer, Secretary, Comptroller, Director of Dealer Sales, and Director of Installment Sale Collections, all maintained offices in New York. Basic policy decisions were made in New York. The personnel, industrial relations, public relations, purchasing, rental and general service, general office sales, international, advertising and sales promotion departments were all headquartered in New York. Customer relations with respect to service, credit, and accounting, affecting sales wherever made, were administered from New York.

The defendant conceded that its New York offices functioned on the executive level in the determination of policy, and in the coordination of all of its varied activities. The defendant claimed, however, that its major function was the production of typewriters, and pointed out that its largest production plant was located in Connecticut, where it carried on research and development as well as operational activities. In addition, the largest number of its employees, its largest payroll, and most of its tangible property,

[1] D.C.S.D.N.Y. 1959, 170 F. Supp. 862. (Discussed in CCH CORPORATION LAW GUIDE ¶ 9960.)

[2] Public Law 85-554, 72 Stat. 415, amending Sections 1331 and 1332 of Title 28, United States Code, effective with respect to actions commenced after July 25, 1958.

were in Connecticut; most shipments were made from there; and most purchases were made within that state. On the basis of these facts, the defendant claimed that its principal place of business was in Connecticut and not in New York.

The court's approach to the question is worth quoting: "Where a corporation is engaged in far-flung and varied activities which are carried on in different states, its principal place of business is the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective." In the instant case, the court observed that policy determinations were made in New York, and direction and control of corporate affairs from New York was supreme, encompassing every phase of the defendant's activities – production, sales, distribution, advertising, public relations and all other related facets. Under these circumstances, the court concluded that the defendant's principal place of business was in New York.

The approach of the court in the *Scot Typewriter Co.* case in emphasizing policy-making, as opposed to operational activities, in determining the location of the principal place of business, has been followed in the three subsequent cases on the question decided in the Second Circuit. These four cases, all decided by the United States District Court for the Southern District of New York, give us the nearest thing to a rule that we have on the question.

In *Hughes v. United Engineers & Constructors, Inc.*,[3] the defendant Delaware corporation conceded that its "main office" was in Pennsylvania, but pointed out that it operated in nine states, including Delaware, that it had more employees in New Jersey than in Pennsylvania, and that it maintained sales offices in both New York City and in Chicago. The court, quoting the language of the court in the *Scot* case, concluded that, nevertheless, the corporation's principal place of business was in Pennsylvania. The fact that defendant's "main office" was in Pennsylvania raised an inference of the center of gravity, the nerve center of the corporate function, which the court considered controlling.

*Metro Industrial Painting Corp. v. Terminal Construction Co., Inc.*,[4] involved a motion to compel arbitration. By cross-motion, the respondent corporations moved to dismiss on the ground, among others, of lack of diversity as to one of the respondents. Petitioners were citizens of New York, and respondents alleged that the respondent Connecticut corporation had its principal place of business in New York. Although it does not appear in the decision, work under the construction contracts involved was apparently performed in New York. The court denied the motion to dismiss, concluding that the corporation's principal place of business was in Connecticut. The affidavit of the petitioner opposing the motion to dismiss, on which the court based its decision, asserted that the corporation maintained an elaborate office building in Bridgeport, all prior construction contracts were negotiated there, payments with respect to work performed under these contracts were made from that office, all correspondence relative to the completion of the projects issued out of that office, the corporation's principal legal counsel was in Bridgeport, and the corporation itself called its Bridgeport office its "main office." Again, the place from which direction and control emanated, as opposed to the place of operational activities, was considered controlling.

[3] D.C.S.D.N.Y.1959, 178 F. Supp. 895.
[4] D.C.S.D.N.Y.1960, 181 F. Supp. 130.

That this is the test used to determine "principal place of business" in the Second Circuit was made clear in the most recent decision in that Circuit, *Wear-Ever Aluminum, Inc. v. Sipas.*[5] To quote the court: "The test laid down in this Circuit is that the corporation's principal place of business is that place which actually functions as the nerve center of the enterprise radiating direction and control over the conduct of the corporate business as a whole."

The courts of Pennsylvania have taken the opposite view. In the Third Circuit it would appear that a corporation's principal place of business is in the state where its principal operational activities are carried on. In *Kelly v. United States Steel Corporation,*[6] the United States Court of Appeals laid down the rule for the Third Circuit: "It is the activities rather than the occasional meeting of policy-making directors which indicate the principal place of business."

The facts in the case indicated that the highest policy-making decisions of the giant corporation were made in New York. The Board of Directors regularly met in New York; the Chairman of the Board was in New York most of each week; the President spent half his time in New York; the Executive Committee of the Board met regularly in New York, as did the Finance Committee; and the Secretary, Treasurer, Comptroller and General Counsel had their offices there. The company owned the building at 71 Broadway; the annual report was mailed from, dividends were declared in, the Public Relations Department and the corporation's major banking activities were centered in, New York.

The court conceded that the final decisions through the Board of Directors, the President and top executive officers were made in New York, and that if the test of "principal place of business" were where such final decisions were made, New York would be the principal place of business. Balancing these important and significant facts with those pointing to Pennsylvania, however, the Court concluded that Pennsylvania, where the corporation's major manufacturing, mining, transportation and general operations took place, and where the Operation Policy Committee sat, was the corporation's principal place of business.

Three United States District Court cases on this question have been decided in the Third Circuit, two in the Western, and one in the Eastern District of Pennsylvania. The first, *Moesser v. Crucible Steel Company of America,*[7] was decided before the Third Circuit Court of Appeals decision in *Kelly v. United States Steel Corporation.* Nevertheless, although the court quoted the "nerve center" language of the Second Circuit *Scot Typewriter Co.* decision, it appears to have decided the issue on the basis of the location of the corporation's operations. "It is clear that the defendant, Crucible Steel Company of America, has its principal place of business in the Commonwealth of Pennsylvania, as most of its products are manufactured here, the greatest number of employees are employed here, its principal holdings are located within the Commonwealth of Pennsylvania, its officers and principal office are located in Pennsylvania, and the nerve center of this manufacturer of steel products is located in the heart of the steel-making center of the world-Western Pennsylvania."

The most recent case in point decided by the United States District Court for the Western District of Pennsylvania, *Potocni v. Asco Mining Co., Inc.,*[8] cites

[5] D.C.S.D.N.Y.1960, 184 F. Supp. 364.
[6] 284 F. 2d 850 (1960). (Discussed in CCH CORPORATION LAW GUIDE ¶ 9620.)
[7] D.C.W.D.Pa.1959, 173 F. Supp. 953.
[8] D.C.W.D.Pa.1960, 186 F. Supp. 912.

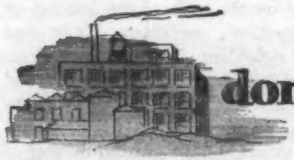
the then unreported Court of Appeals decision in *Kelly v. United States Steel Corporation* as authority for the proposition that the state wherein a corporation carries on its chief operations is the principal place of business of that corporation.

The decision of the United States District Court, E. D. Pennsylvania, in *Bryfogle v. Acme Market, Inc.*,[9] decided before the *United States Steel Corporation* case, is inconclusive on this issue since both the high policy-making decisions of the Board of Directors and the largest percentage of the corporation's operations took place in Pennsylvania.

Two further decisions interpreting "principal place of business" have come to our attention, one by the United States District Court for the Southern District of Illinois[10] and one by the United States District Court for the District of Minnesota.[11] Although neither can be taken as the rule for either the Seventh or the Eighth Circuits, it is interesting that the Illinois case seems to adopt the Second Circuit *Scot Typewriter Co.* case approach, emphasizing direction and control, while the court in the Minnesota case employs the Third Circuit Court of Appeals method, emphasizing the place of operations.

It is not unlikely, in view of the divergence between the Circuits in the interpretation of "principal place of business," that the question will eventually reach the United States Supreme Court. Until that court settles the issue, the troublesome phrase will continue to have different meanings in different jurisdictions, and some multistate corporation may find that it has, for the purposes of diversity jurisdiction, two principal places of business.

[9] D.C.E.D.Pa.1959, 176 F. Supp. 43.
[10] *Riley v. Gulf, Mobile & Ohio R. R. Co.*, D.C.S.D. Ill. 1959, 173 F. Supp. 416. (Discussed in CCH CORPORATION LAW GUIDE ¶ 9872.)
[11] *Mattson v. Cuyuna Ore Co.*, D.C.D.Minn.1960, 180 F. Supp. 743.



## domestic corporations

### DELAWARE

**In stockholders' derivative action, defendants denied discovery as to names of persons who gave information to plaintiff relating to irregularities by employees of defendant corporation where such persons could be subject to economic sanctions by corporation.**

Certain defendants in a stockholders' derivative action made a motion for the production of documents and an order compelling plaintiff to identify those who gave him information relating to alleged irregularities by executives and employees of the corporation. Plaintiff had refused to answer on the ground that he had promised not to reveal such names and because such persons could be subject to economic sanctions by the corporation.

The Court of Chancery for New Castle County granted the motion as to the names and addresses of alleged informers who were not employees, dealers, or suppliers of the corporation at the time of the

decision, but held that plaintiffs did not need to identify alleged informers who were still employees, dealers or suppliers of the corporation who made the disclosures under a promise that their identity would not be revealed and who were not to be called as witnesses. The court determined that all documents provided by informers should be produced unless production would disclose the identity of the informer providing them. The court concluded that it imposed these limitations because of its belief that these persons could be the victims of economic sanctions, and because it had not been shown that the corporation would be prejudiced by not having the names of those falling within the limitation. "I believe the application of the discovery rules are subject to the exercise of the court's sound discretion . . . and I feel that this is a proper case for the imposition of the limited restraint imposed."

*Dann v. Chrysler Corp.*, 166 A. 2d 431. Clarence W. Taylor and Russell J. Willard of Hastings, Taylor & Willard, of Wilmington, and Lewis M. Dabney, Jr., of New York City, for plaintiffs. Aaron Finger and Robert H. Richards, Jr. of Richards, Layton and Finger, for defendant Chrysler Corporation. Richard F. Corroon, of Berl, Potter & Anderson, for defendants Brady, Dodge, Jones, Love, McCollum, McElroy, McNeill, Page, Tripp and Warren. James M. Tunnell, Jr. and S. Samuel Arsht of Morris, Nichols, Arsht and Tunnell, for defendants Colbert, Jacobson, Leary, Misch, Quinn, Row, Townsend and Woolson. Daniel L. Herrmann of Herrmann and Duffy, for defendants Ackerman, Bright and Laughna. Clair John Killoran of Killoran and VanBrunt, for defendants K. T. Keller and Robert Keller. John J. Morris, Jr. of Morris, James, Hitchens & Williams, for defendant Nafi Corporation. Albert W. James of Morris, James, Hitchens & Williams, for defendant Minor. William Prickett of Prickett and Prickett, for defendant Newberg.

## Majority of board of directors not required to approve resolution setting up committee to grant stock options where committee's actions were subject to approval of board.

This case was concerned with a stockholder attack on the validity of stock options granted to employees of defendant corporation. At a meeting of the board of directors on June 21, 1950, the president was authorized by resolution to appoint a committee of five directors, with full power to determine the persons to whom options should be granted, and the amounts and terms thereof, but subject to the approval of the board as to price and authorization for issuance. The by-laws of the corporation provided for a quorum of six directors, and at least six disinterested directors were present at the meeting. Section 141(c) of Title 8 Del. C. requires, however, that a majority of the board approve the creation of a committee authorized to exercise the powers of the board of directors in the management of the business and affairs of the corporation.

The Court of Chancery of Delaware, New Castle County, was of the opinion that the resolution of the board setting up the committee did not purport to set up a committee with plenary powers within the intendment of Section 141(c), since the committee's actions in connection with granting options were subject to the approval of the board. Therefore, it was not necessary that a majority of the board adopt the resolution setting up the com-

mittee. The court concluded that "the option committee here actually served no useful purpose other than to simplify the work of the board as to option grants, the ultimate authority over option grants being reserved to the board. Clearly it was not a committee with statutorily delegated plenary powers over all aspects of an option plan and grants thereunder." Judgment was for the defendants.

*Elster v. American Airlines, Inc.*, 167 A. 2d 231. William E. Taylor, Jr., of Wilmington, and William E. Haudek of Pomerantz, Levy & Haudek, of New York City, for plaintiffs. Richard F. Corroon of Berl, Potter & Anderson, of Wilmington, and Debevoise, Plimpton & McLean, of New York City, for defendant American Airlines, Inc. E. N. Carpenter, II, of Richards, Layton & Finger, of Wilmington, for defendants C. R. Smith and O. M. Mosier.

# foreign corporations

## MARYLAND

**Statute providing for service on foreign corporation by service on state official, and requiring official to mail process to address of corporation on file, held valid even though it did not require return receipts.**

Defendant foreign corporation was doing business in Maryland, and this action arose out of an incident which occurred within the state. Defendant moved to quash the service of summons upon it, alleging that the statute under which the service was made was unconstitutional. The statute in question provided, *inter alia*, that if a foreign corporation subject to suit in the state had no resident agent, it would be conclusively presumed to have designated the State Tax Commission as its attorney to accept service. The statute further provided that the Commission should forward the process by registered mail to either the corporation's mailing address on file with the Commission, its principal office, or to the secretary of state of the state of its incorporation. There was no provision requiring the Commission to obtain a return receipt from the corporation.

The United States District Court, D. Maryland, concluded that the "form of service provided for by the statute must be reasonably calculated to bring notice of the suit to the foreign corporation," but "securing a return receipt and filing it with the court clerk is not a prerequisite; it is only one of the possible provisions which may be adopted." The motion to quash the service was denied.

*Speir v. Robert C. Herd & Co.*, 189 F. Supp. 432. John J. O'Connor, Jr., O'Connor & Preston, of Baltimore, for plaintiff. George W. P. Whip, of Baltimore, appearing specially, for Newtex S. S. Corp.

## MINNESOTA

### Service on unlicensed foreign corporation by service on Secretary of State held sufficient under statute providing for such service where foreign corporation enters into contract with resident to be performed in whole or in part in state.

Plaintiffs brought this action in the United States District Court, D. Minnesota, against defendant unlicensed foreign corporation for breach of contract. The court stated that the sole issue was whether or not the service of process was lawful. The contract was entered into by the parties following an advertisement placed in a Minnesota paper by defendant foreign corporation. The advertisement solicited inquiries from those interested in distributing defendant's products, "Wonder Buildings". By the contract, plaintiffs were authorized to distribute defendant's products on an exclusive basis in certain Minnesota counties. Occasionally, defendant's agents called on Minnesota customers with plaintiffs. Negotiations to some extent were carried on by defendant's agent and plaintiffs in Minneapolis, and calls were made by a representative of defendant on plaintiffs in Minnesota in connection with sales promotions and to adjust a claim. Prices quoted to plaintiffs by defendant were f.o.b. Chicago plant, and plaintiffs in turn would resell to their customers f.o.b. the job site.

Service was made on defendant by service on the Secretary of State of Minnesota under M. S. A., Section 303.13, which provides, *inter alia*, that if a foreign corporation makes a contract with a resident of the state to be performed in whole or in part by either party in Minnesota, the corporation shall be deemed to be doing business in Minnesota and to have appointed the Secretary of State its attorney for service of process in actions arising out of such contract. The United States District Court, noting the clearly discernible trend toward expanding the permissible scope of state jurisdiction over foreign corporations, found that defendant was sufficiently active in Minnesota to indicate its presence therein for service of process. Defendant's motion to dismiss or for summary judgment was denied.

*McMenomy v. Wonder Building Corporation of America*, 188 F. Supp. 213. McMenomy & Hertogs, by Edward B. McMenomy, of Hastings, Minn., for plaintiffs. O'Connor, Green, Thomas & Walters, by Frederick W. Thomas and Joe A. Walters, of Minneapolis, for defendant.

## NEW HAMPSHIRE

### Unlicensed foreign corporation held not subject to service of process in New Hampshire where its activities in that state consisted in one sale of realty and the holding there of two trustees' meetings.

Plaintiff instituted suit against defendant unlicensed foreign corporation on a cause of action arising in another state. Plaintiff appealed from a judgment granting defendant's motion to dismiss on the ground that it was not doing business in New Hampshire and was not subject to the jurisdiction of that state's courts. Defendant was a charitable corporation incorporated in Vermont, where it had its only place of business, an institution for the mentally ill. It maintained no

## CT DOMESTIC CORPORATION LAW FEATURES COVER:

INITIAL COSTS: Fees payable to various state and county officials . . . ANNUAL TAXES: Rates, minimums, etc. . . . INCORPORATION: Publication, number and qualification of incorporators, subscribed shares or paid-in capital, use of words denoting a corporation, protection of name, reservation of name . . . AUTHORIZED SHARES: Classification, series, consideration for shares, valuation of consideration, allocation of consideration between capital and surplus, convertible shares or securities, warrants or options, fractional shares, scrip, pre-emptive rights, retirement of preferred or special shares, statement of relative rights on share certificates . . . VOTING RIGHTS: Stock, cumulative voting, bonds . . . DIVIDENDS: Source, wasting assets corporations, stock dividends . . . POWERS: Existence, indebtedness, to hold real estate, to mortgage corporate property, to sell entire assets, to purchase and hold own shares, to purchase and hold shares of other corporations, to indemnify directors and officers, to make charitable donations, to enter into partnership, to establish pension plans . . . AMENDMENT: Amendments permitted, vote required . . . REDUCTION OF CAPITAL . . . BY-LAWS . . . SHAREHOLDERS: Meetings, where held, waiver of notice, quorum, action by written consent without meeting, closing of transfer books or fixing record date, proxies, liabilities other than for unpaid stock subscriptions . . . DIRECTORS: Number and qualifications, classification, vacancies, removal, quorum, action without a meeting, committees, liabilities, indemnification . . . BOOKS AND RECORDS: Where kept, inspection . . . VOTING TRUSTS . . . MERGER OR CONSOLIDATION . . . VOLUNTARY DISSOLUTION.

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office, no agents, owned no property and had instituted no litigation in New Hampshire. The defendant had sold to New Hampshire a tract of undeveloped land it had owned in the state, a sale which took place prior to the events which gave rise to the commencement of this action; and the defendant's board of trustees had held two meetings in New Hampshire at the summer home of a trustee who was unable to travel to Vermont.

The New Hampshire Supreme Court, affirming the judgment of the lower court granting defendant's motion to dismiss, concluded that in the circumstances of this case the defendant was not doing business in this state.

*Benson v. Brattleboro Retreat*, CCH NEW HAMPSHIRE TAX REPORTS ¶ 200-026, 164 A. 2d 560. James W. Winston (by brief and orally), for plaintiff. Gannett & Oakes, of Vermont, and McLane, Carelton, Graf, Green & Brown, and David L. Nixon (Mr. Nixon orally), for defendant. (Petition for writ of certiorari filed in the United States Supreme Court, February 20, 1961; Docket No. 755.) (See page 97.)

## TEXAS

### Qualified foreign corporation held entitled to bring suit in state courts in action which arose out of business transacted in state before it was qualified.

Plaintiff foreign corporation brought this action for an unpaid account. The action arose out of business transacted in Texas before the plaintiff corporation had obtained a permit to do business in the state, and one of defendant's defenses was that such a corporation was not entitled to bring suit in the state courts.

The Court of Civil Appeals of Texas observed that plaintiff had subsequently obtained a permit to do business, and concluded that the Texas Business Corporation Act permitted a foreign corporation to file suit "after obtaining a certificate of authority, even on actions arising out of business transacted before it had the permit."

*Ammann v. St. Joe Paper Co.*, 341 S. W. 2d 700. Morris R. Edwards, of San Antonio, for appellant. LeLaurin, Chamberlin & Guenther, of San Antonio, for appellee.

## WASHINGTON

### Assignee of unlicensed foreign corporation held entitled to maintain suit to collect assigned debt where assignment was not made to defeat statute prohibiting suits by unlicensed foreign corporations.

This action was originally brought by an unlicensed California corporation to collect the purchase price of certain products sold to defendants. The California corporation was a wholly owned subsidiary of a New York corporation, and in 1955 it assigned all its assets to the New York parent, including the debt sued upon. In 1957, the California corporation was officially dissolved. The New York corporation came in as an additional party plaintiff in 1956, and the defendants took the position that it could not maintain the action on the theory that an unqualified corporation could not assign its claim for collection to a qualified corporation for the purpose of defeating the statutory prohibition against the maintenance of suit by unqualified corporations.

The Supreme Court of Washington found that the assignment here was not an assignment for collection, but rather

an assignment of all the assets of the subsidiary to the parent during the process of the subsidiary's dissolution. Since the assignment was not made for the purpose of defeating the statute, the New York corporation acquired all the rights in the claim for indebtedness which the California corporation had previously owned. In addition, the court determined that the fact that the New York corporation did not qualify until after it had become a party to the action was "not fatal to its right to maintain the action."

*Technical Tape Corp. v. Slusher*, 358 P. 2d 304. Hoof, Shucklin & Harris, of Seattle, for appellants. Eddleman & Wheeler, Arnold B. Robbins, of Seattle, for respondents.

# taxation

## FLORIDA

### Foreign corporation selling material to Florida distributors who had resale certificates held not required to collect Florida use tax.

Appellant foreign corporation sought reversal of a decree holding it liable for the collection of the Florida use tax. Appellant, whose headquarters were in Chicago, was in the business of manufacturing and selling radios, phonographs and television sets. It sold these products to independent dealers in Florida, the sale being completed in Chicago. The distributors in turn sold to retailers in Florida who ultimately disposed of the commodities to the general public. Appellant also sold to its Florida distributors advertising items such as folders, banners, charts and display racks, the great majority of which were distributed without charge to the Florida retailers. The distributors had on file with plaintiff resale certificates executed pursuant to rules promulgated by the Comptroller under the Florida Sales and Use Tax Law. Plaintiff was represented in the Southeast by a regional manager who traveled in Florida and elsewhere contacting plaintiff's distributors, and on occasion its retail dealers. His job was primarily promotional, acting as liaison between plaintiff's wholesale outlets in Florida and its Chicago home office. The Comptroller assessed a use tax against plaintiff covering the advertising materials sold to its distributors, and the lower court held that plaintiff should have collected the use tax from its Florida distributors.

The Florida Supreme Court, citing *Scripto, Inc. v. Carson*, Fla. 1958, 105 So. 2d 775, aff'd. 362 U. S. 207, 80 S. Ct. 619 (The Corporation Journal, June—July 1960, page 343), addressed itself first to the question of jurisdiction, and determined "that there was a sufficient jurisdictional contact with Florida to enable this State to impose" on the corporation the burden of collecting the tax. However, the court concluded that since the distributors purchased all of the commodities from the corporation under resale certificates, the corporation was "excused from what otherwise might be a responsibility to collect the tax." The decree of the chancellor was reversed.

*Motorola, Inc. v. Green*, CCH FLORIDA TAX REPORTS ¶200-380, Supreme Court of Florida, December 14, 1960. Hazard & Thames and O. O. McCollum, Jr., for appellant. Barnes & Slater, for appellees.

## MINNESOTA

**Domestic corporation which had reduced its authorized capital stock, and subsequently increased it to an amount less than the highest prior authorized amount on which tax had been paid, held not required to pay tax on increase.**

The question involved in this case, as stated by the court, was as follows: When a domestic corporation has paid the tax required under M. S. A. Section 300.49 on its authorized capital and thereafter reduces its authorized capital and subsequently increases it, is the tax required by such increase to be computed on the excess over the highest prior authorized capital on which the tax had been paid or on the increase over the authorized capital immediately preceding such increase?

The Supreme Court of Minnesota, after examining similar statutes and their interpretation in other jurisdictions, found that the great weight of authority supported the view that a corporation, in these circumstances, should pay only on the increase over the highest prior authorized amount. In addition, the court found that M. S. A. Section 303.15 gave credit for taxes previously paid on total authorized capital in the case of a foreign corporation. The court concluded that "it is difficult to perceive any reason why the legislature would intend to discriminate against domestic corporations and require a tax on an authorized capital on which the tax had once been paid simply because at one time there had been a reduction in the authorized capital." The judgment of the trial court commanding the Secretary of State to file an amendment to the corporation's articles of incorporation increasing its authorized capital stock without payment of any further charges, was affirmed.

*Northern States Power Company* v. *Donovan*, CCH MINNESOTA TAX REPORTS ¶ 200-115, 103 N. W. 2d 126. Miles Lord, Atty. Gen., John F. Casey, Jr., Sp. Asst. Atty. Gen., for appellants. Linus J. Hammond, of St. Paul, Donald E. Nelson, Leon B. Luscher, Roland W. Comstock, Arland D. Brusven, of Minneapolis, Cummins, Cummins, Hammond, Cummins & O'Brien, of St. Paul, for respondent.

## TEXAS

**In allocation of gross receipts for franchise tax purposes, entire sale price of marketable securities, and not merely net gain to corporation from sale, held properly included in the denominator, "total gross receipts of the corporation from its entire business."**

Taxpayer qualified foreign corporation had purchased marketable securities during 1955 for a price of $5,078,088. The securities were purchased for the taxpayer by a New York bank, held by the bank in New York and sold by it in 1955 for $5,100,000. The controversy arose over whether the entire sale price or merely the net gain should be included in the total gross receipts of the taxpayer from its entire business for the purpose of the Texas franchise tax. The inclusion of the total sale price would serve to lower taxpayer's franchise tax since Art. 7084, Vernon's Ann. Civ. St., provides that the tax shall be "based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of

outstanding bonds, notes and debentures . . . as the gross receipts from its business done in Texas bears to the total gross receipts from its entire business . . ."

The Court of Civil Appeals concluded that the phrase "total gross receipts" was unambiguous and therefore not open to construction, and that there was "no escape from the conclusion that the entire proceeds from the sale of the securities must be included in "the total gross receipts of the corporation from its entire business." The judgment of the trial court ordering a refund to the taxpayer was affirmed.

*Steakley v. West Texas Gulf Pipe Line Co.*, 336 S.W. 2d 925. Will Wilson, Atty. Gen., W. V. Geppert, Marvin H. Brown, Jr., Jack N. Price, Asst. Attys. Gen., for appellants. John S. Redditt, of Lufkin, Dan Moody, Dan Moody, Jr., Looney, Clark, Mathews, Thomas & Harris, of Austin, W. F. Erwin, Jr., of Houston, for appellee.

## VIRGINIA

### Qualified foreign corporation held subject to tax on net income "derived from business done" in state where its salesmen regularly, systematically and continuously solicited the resale of corporation's products from wholesalers to retailers.

Taxpayer, a foreign corporation qualified to do business in Virginia, filed an application in the lower court seeking the recovery of income taxes paid by it under the income tax law prior to its amendment in 1960. Taxpayer was a manufacturer and wholesale distributor of plumbing fixtures, heating and air conditioning equipment. It maintained no manufacturing facilities, stock of goods or inventory in Virginia. During the years in question, taxpayer had nine to sixteen agents or employees attached to its Richmond office. During these years seven local wholesale distributors of the taxpayer in Virginia were contacted from time to time by taxpayer's salesmen. Orders were forwarded to taxpayer's Pittsburgh office for acceptance or rejection, and products were shipped f.o.b. taxpayer's plants outside Virginia. In addition, it was the practice of taxpayer's salesmen to contact prospective local users of taxpayer's products and to induce them to purchase such products from taxpayer's wholesale distributors.

The Supreme Court of Appeals of Virginia concluded that the taxpayer was doing business in Virginia within the meaning of Section 58-128 of the Virginia Code prior to the 1960 amendment, which imposed a tax on the net income of corporations "derived from business done, property located or sources in this state". The court pointed out the that taxpayer's "agents or representatives were employed for no other purpose. The regular, systematic, continuous and substantial activities carried on in Virginia by taxpayer's salesmen, the solicitation of orders from its local wholesale dealers, inducing the resale of taxpayer's products in Virginia from a Virginia wholesaler to a Virginia retailer or consumer, in which activities it was the practice of taxpayer's salesmen to engage, constitute intrastate, domestic or local commerce, and thus taxpayer was doing business in Virginia within the meaning of Code, Section 58-128." The order of the trial court granting the taxpayer a refund was reversed.

*Commonwealth v. American Radiator and Standard Sanitary Corp.*, CCH VIRGINIA TAX REPORTS ¶ 200-040, 116 S. E. 2d 44.

# state legislation

**Missouri** — The Missouri Supreme Court has ruled that the Missouri Use Tax Act is valid in two decisions handed down on March 13 in the cases of *Southwestern Bell Telephone Company v. Morris* and *Missouri Pacific R. R. Co. v. Morris.* The decisions reversed the rulings of the Circuit Court of Cole County which had held the law void in its entirety.

**Pennsylvania** — House Bill 89 of 1961 makes the 6% income tax rate permanent. The rate had been scheduled to become permanent at 5% in 1962. In addition, for the taxable year 1961 and for each taxable year thereafter, the Act increases the amount of the prepayment of the income tax, at the option of the corporation, to either 4.8% (formerly 3%) of the preceding year's net income, or 19.2% (formerly 12%) of the net income earned in the first three months of the current year.

**Rhode Island** — Chapter 52 of 1960, which provided for the assessment and collection of intangible property taxes by the state, was declared void in a decision of the Rhode Island Supreme Court rendered January 23, 1961, in *Moore v. Langton.* Senate Bill 74 of 1961, passed by the Legislature as a result of this decision, reenacts the former provisions, repealed by Chapter 52, providing for the collection of the intangibles tax by municipalities.

**Utah** — The new Utah Business Corporation Act, Senate Bill 4 of 1961, will become effective January 1, 1962. The new law follows substantially the provisions of the Model Business Corporation Act prepared by the Committee on Corporate Laws of the American Bar Association.

**West Virginia** — Senate Bills 2 and 3 of 1961, effective with respect to sales made on or after January 16, 1961, through August 31, 1961, impose an additional sales tax on sales of over one dollar at the rate of one cent for each one dollar, or fraction thereof, in excess of the first dollar of the sale.

Senate Bill 106 of 1961 imposes a personal income tax on residents and nonresidents at the rate of 6% of the federal income tax. The tax applies to taxable years ending on or after December 31, 1961, including the part of 1961 prior to its enactment. The tax also applies, on a pro rata basis, to fiscal years beginning before 1961 and ending in 1961. Every employer who maintains an office or transacts business in West Virginia will be required to withhold the personal income tax from wages paid to residents and nonresidents in accordance with the method to be promulgated by regulations of the State Tax Commissioner. Withholding is scheduled to commence April 1, 1961, and the 1961 rate will reflect the withholding of the tax on a full year's wages for the remaining months in 1961.

**Wyoming** — Effective July 1, 1961, Wyoming will have a new Corporation Law. The new law, Chapter 85, Laws of 1961, signed by the Governor February 14, 1961, will be known as the Wyoming Business Corporation Act. The Act follows substantially the provisions of the Model Business Corporation Act prepared by the Committee on Corporate Laws of the American Bar Association.

# appealed to the supreme court

***The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.****

**ALASKA.** Docket No. 106. *Arctic Maid v. Territory of Alaska,* CCH ALASKA TAX REPORTS ¶ 200-034, 277 F. 2d 120. (The Corporation Journal, December 1960—January 1961, page 54.) Business license tax—interstate commerce. **Petition for writ of certiorari filed, May 27, 1960. Certiorari granted, October 10, 1960.** (81 S. Ct. 45)

**NEW HAMPSHIRE.** Docket No. 755. *Benson v. Brattleboro Retreat,* CCH NEW HAMPSHIRE TAX REPORTS ¶ 200-026, 164 A. 2d 560. (The Corporation Journal, April—May 1961, page 89.) Service of process—doing business. **Petition for writ of certiorari filed, February 20, 1961.**

**NEW JERSEY.** Docket No. 203. *Eli Lilly and Company v. Sav-on-Drugs, Inc.,* CCH NEW JERSEY TAX REPORTS ¶ 200-146, 31 N. J. 591, 158 A. 2d 528. (The Corporation Journal, April—May 1960, page 329); affirming 57 N. J. Super. 291, 154 A. 2d 650. (The Corporation Journal, February—March 1960, page 308.) Doing business—enforcement of contracts. **Appeal filed, June 20, 1960. Jurisdiction noted, October 17, 1960.** (81 S. Ct. 102) **The motion of the State of New Jersey to be named a party appellee is granted, February 20, 1961.**

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* Data compiled from **CCH U. S. Supreme Court Bulletin.**

## Discussions on Corporation Law

**Basic Corporate Practice,** Second Edition (October 1960) by George C. Seward. Published by the Joint Committee on Continuing Legal Education of the American Law Institute of the American Bar Association.

**Hedging The Restricted Stock Option,** by Mason J. O. Klinck. 14 Journal of American Society of Chartered Life Underwriters, Fall, 1960, page 457.

**Private Corporate Stock Subscription Agreements,** by Paul A. Winton. Southern California Law Review, Summer, 1960, page 388.

**Negligent Management of Corporations,** by Raymond C. Loyer. 9 Cleveland-Marshall Law Review, September, 1960, page 554.

**Shareholder Pre-Emptive Rights in Florida.** 13 University of Florida Law Review, Summer, 1960, page 221.

**The Nature and Treatment of Dividends Under the Entity Concept,** by David H. Li. 35 Accounting Review, October, 1960, page 674.

**The Pennsylvania Manufacturing Exemption Revisited,** by Robert E. Cusick. Taxes, The Tax Magazine, November, 1960, page 837.

**The Public Interest in the Corporation,** by Frederick G. Kempin, Jr. 64 Dickinson Law Review, June, 1960, page 357.

# regulations and rulings

**Delaware** — A corporation which has property, or pays wages or has gross receipts or sales, classified as not being within Delaware, is entitled to use the statutory apportionment formula for computing its Delaware corporation income tax. The test for use of the formula is whether business is conducted in part outside the state, not whether there is sufficient activity to constitute "doing business" in another state. (Opinion of the Attorney General, CCH DELAWARE TAX REPORTS ¶ 200-040)

**Florida** — Those persons who paid ad valorem taxes on the separate assessment of subsurface oil and mineral rights, under Sec. 193.221, which was held to be unconstitutional in the case of *Cassady v. Consolidated Naval Stores Co.*, are entitled to refunds of such taxes but not to interest thereon. Applications for refunds should be addressed to the Comptroller, but filed with the county tax assessor. The limitation for filing claims is within one year from the time the right to such refund accrues or from the date of the payment of an assessment. (Opinion of the Attorney General, CCH FLORIDA TAX REPORTS ¶ 200-399)

Tangible personal property held in stock or warehouse storage in the state for the purpose of export sales only, is subject to Florida's tangible personal property taxing statutes. Cigarettes and liquor, which are purchased and stored in federally authorized bonded warehouses for the purpose of making sales or filling orders for the same to be delivered as exports beyond the boundaries of the United States, are the property of the exporter acquired in preparation of export sales, but are no part of the exports to be made therefrom until sold by the exporter and by him delivered to a common carrier for delivery to the purchaser outside the United States. Also, the fact that a person's property may be in a federal warehouse does not confer upon him immunity from state taxation. Thus, tangible personal property, so stored, is subject to Florida's tangible personal property taxing statute, unless otherwise exempted as an import. (Opinion of the Attorney General, CCH FLORIDA TAX REPORTS ¶ 200-400)

**New Mexico** — The Corporation Commission may permit the Tax Commission to examine Franchise Tax Reports filed with it by companies in order that the Tax Commission may secure information for the assessment of ad valorem taxes upon such companies. However, only reports filed under the Corporate Reports Act, Laws 1959, subsequent to January 1, 1960, the effective date of the Act, may be examined. (Opinion of the Attorney General, CCH NEW MEXICO TAX REPORTS ¶ 200-195)

**North Carolina** — Funds in out-of-state building and loan associations should be considered as shares of stock and assessed intangibles tax at the rate of 25¢ per $100 as provided by Sec. 105-203. (Opinion of the Attorney General, CCH NORTH CAROLINA TAX REPORTS ¶ 200-755)

Personal property taxes become liens upon real property owned by a taxpayer as of January 1. Personal property taxes do not become liens upon real estate acquired by a taxpayer subsequent to January 1. (Opinion of the Attorney General, CCH NORTH CAROLINA TAX REPORTS ¶ 200-756)

# some important matters

## *For April and May*

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

**Alabama** — Franchise Tax due April 1; delinquent after April 30.

**Arizona** — Income Tax and Annual Report due on or before April 15.

**Arkansas** — Income Tax Return due on or before May 15.

**California** — Quarterly Retail Sales Tax due on or before April 30.

**Colorado** — Income Tax Return due on or before April 15.
Annual Report and Franchise Tax due May 1.

**Connecticut** — Quarterly Retail Sales Tax due on or before April 30.

**Delaware** — Annual Franchise Tax due after April 1 and before July 1. — Domestic Corporations.

Returns of Information at the source due on or before April 30. — Domestic and Foreign Corporations making certain payments of salaries, dividends, interest or other income to residents of Delaware during 1960.

Quarterly Withholding at Source Returns due April 30.—Domestic and Foreign Corporations paying compensation to Delaware employees.

**District of Columbia** — Franchise (Income) Tax Return due April 15.

Annual Reports of companies incorporated, reincorporated or qualified under the Business Corporation Act of 1954, due April 15.

**Georgia** — Income Tax Return due April 15.

**Idaho** — Income Tax Return due on or before April 15.

**Indiana** — Quarterly Gross Income Tax due on or before April 30.

**Iowa** — Quarterly Retail Sales Tax due on or before April 30.
Income Tax Return due on or before April 30.

**Kansas** — Income Tax Return due April 15.

**Kentucky** — Income Tax and Corporation License Tax due on or before April 15.

**Louisiana** — Income Tax Return due on or before May 15.—Franchise Tax Report and Tax due on or before May 15.

**Maryland** — Annual Report (Personal Property Return) and Franchise Tax Report and Tax due on or before April 15.—Domestic Corporations.

Income Tax Return due April 15.

Annual Report (Personal Property Return) and Filing Fee due on or before April 15.—Foreign Corporations.

**Massachusetts** — Returns of Information at the Source due on or before June 1.

**Michigan** — Annual Report and Franchise Tax due on or before May 15.

**Missouri** — Quarterly Retail Sales Tax due on or before April 15.

Income Tax Returns due on or before April 15.

**Montana** — Annual Statement due in April and May.—Foreign Corporations.

**New Jersey** — Franchise Tax Report and payment due on or before April 15.

**New Mexico** — Income Tax Return due on or before April 15.

Franchise Tax due on or before May 1.

**New York** — Annual Franchise (Income) Tax Return (Form C T 3—Article 9A Tax Law) and one-half of tax due May 15—Business Corporations, Holding Companies and Investment Trusts.

**North Carolina** — Intangible Property Tax due April 15.

**North Dakota** — Income Tax Return due on or before April 15.

Quarterly Retail Sales Tax due on or before April 30.

**Oregon** — Excise (Income) Tax Return due on or before April 15.

**Pennsylvania** — Capital Stock—Corporate Net Income—Loans Taxes Report and Tax due on or before April 15.—Domestic Corporations.

Franchise—Corporate Net Income—Loans Tax Report and Taxes due on or before April 15.—Foreign Corporations.

**Rhode Island** — Business Corporation Tax due on or before May 1.

**South Dakota** — Quarterly Retail Sales Tax due on or before April 15.

**Texas** — Franchise Tax due on or before May 1.

**Utah** — Income (Franchise) Tax Return due on or before April 15.

Quarterly Retail Sales Tax due on or before April 30.

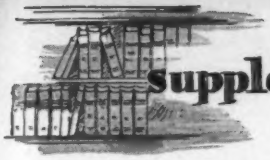
**Vermont** — Income (Franchise) Tax Return due on or before May 15.

**Virginia** — Income Tax Return due on or before April 15.

Income Tax due June 1.

**West Virginia** — License Tax Report due in April.—Foreign Corporations.

Quarterly Business and Occupation (Gross Sales) Tax due April 30.



# supplementary literature

*In connection with its various activities The Corporation Trust Company publishes the following supplemental pamphlets, any of which will be sent without charge to readers of The Journal. Address The Corporation Trust Company, 120 Broadway, New York 5, N. Y.*

**Heads I Win, Tails You Lose.** An explanation of the possible consequences to the corporation which takes a chance [?] on doing business in states outside the state of its incorporation without complying with governing laws, rulings and regulations.

**Spot Stocks Mean More Sales.** A review of the advantages *and* dangers of using spot stocks at strategic shipping centers to bolster and increase sales.

**Agent for Process.** Case histories of corporation officials who suddenly found out that trouble can take funny bounces when statutory representation is entrusted to a business employee.

**Corporate Confusion.** A discussion of the wriggling, twisting, seemingly opposite court decisions which make building a pattern for out-of-state operations by a corporation a risky business these days.

**A Pretty Penny . . . Gone!** What it can cost a corporation—as shown by actual court cases—if its agent cannot be found when service of process is attempted.

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**Suppose The Corporation's Charter Didn't Fit!** Shows how charter provisions which suit well enough at time of organization may be handicaps for the corporation in later life — and some measures to avoid them that a lawyer may help his client to take.

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# The CORPORATION JOURNAL

The Corporation Journal is published by The Corporation Trust Company bi-monthly, February, April, June, August, October and December. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers and accountants upon written request to any of the company's offices.

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